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WONG KWI FONG

v.

TENAGA NASIONAL BHD

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HIGH COURT MALAYA, KUALA LUMPUR
NOOR AZIAN SHAARI J
[SUIT NO: S5-22-370-2005]
15 OCTOBER 2010

C ***PUBLIC UTILITIES:*** *Electricity - Notice to disconnect electricity - Meter inaccuracy - Tampered meter - TNB's claim for loss in revenue - Whether retrospective claim could not exceed three months from date plaintiff informed of undercharge - Licensee Supply Regulations 1990, reg. 11, proviso - Electricity Supply Regulations 1990, s. 37(3)*

D ***INTERPRETATION OF STATUTES:*** *Licensee Supply Regulations 1990, reg. 11 - Proviso - Meter inaccuracy - Retrospective adjustment not more than three months from date consumer informed of undercharge/ overcharge - Whether meter inaccuracy arising from tampered meters covered by proviso - Electricity Supply Regulations 1990, s. 37(3)*

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The defendant company, a supplier of electricity to customers, found that the meter at the plaintiff's rented premises had been tampered with and issued a notice to the plaintiff for an offence under s. 37(3) of the Electricity Supply Act 1990 ('Act 1990'). F The defendant also notified the plaintiff that the electricity supply to the premises would be terminated unless a sum of RM717,393.78 was paid within 14 days of the notice. The plaintiff then commenced this suit against the defendant, *inter alia,* for a declaration that the defendant had no right to issue the G notice, an interlocutory injunction to stop the defendant from cutting off the electricity supply, and damages. The plaintiff was able to obtain the injunction pending the outcome of the suit. The defendant in its defence claimed that the plaintiff had tampered with the meter and since the tampering was discovered on H 15 February 2005, it counter-claimed for loss in revenue from 21 August 2000 until 16 January 2005 in the sum of RM717,393.78. This court dismissed the plaintiff's suit and allowed the defendant's counter-claim which was reduced to three months, *ie*, RM47,313.08 instead of RM717,393.78. As there was I now an appeal by the defendant against the decision of this court

on the amount that was awarded, the learned judge had only provided her grounds of judgment for awarding the reduced amount as per held below.

Held (allowing defendant's counter-claim to the extent of three months only):

(1) The defendant was entitled to claim for loss in revenue by virtue of s. 38(3) of Act 1990. However, the proviso to reg. 11(2) of the Licensee Supply Regulations 1990 ('Regulations') provided that any retrospective adjustment must not exceed three months from the date the consumer had been informed about being undercharged or overcharged. The defendant's submission that the proviso was only meant for inaccurate and/or incorrect meter reading due to the fault of the defendant such as faulty meter or a not working meter, was not accepted. The proviso very clearly stated that it applied if there was inaccuracy in the reading of the meter. If inaccuracy arising out of tampering was meant to be excluded, then words to that effect would have been added into the relevant regulation. (paras 13 & 16)

(2) Although the learned judge in the case of *Tan Yeong Kim v. Tenaga Nasional Berhad* did not address the application of reg. 11 of the Regulations to cases of tampering, it could not be cited by the defendant in support of its submission that the proviso was inapplicable in such cases - the reason being - that the said case was decided when the proviso had not been inserted into reg. 11 at the material time. (para 17)

(3) The proviso to reg. 11 of the Regulations in all likelihood was inserted so as not to burden consumers of the essential service when the fault was that of the supplier. Inaccuracy/ incorrect meter reading arising out of tampering was inadvertently not taken into account. It must also be noted that nowhere in Act 1990 was there an exception to the proviso to reg. 11 of the Regulations in respect of collection of losses of revenue in cases of tampered meters. For the above reasons, the defendant's counter-claim to the extent of only three months was allowed. (paras 18-20)

Case(s) referred to:
Tan Yeong Kim lwn. Tenaga Nasional Bhd [2000] 8 CLJ 629 HC ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, ss. 37(3), 38(3), (4), (5)
Licensee Supply Regulations 1990, reg. 11(2)(a)

For the plaintiff - Robin Lim (PK Kee with him); M/s Azhar & Wong
For the defendant - Anita Ibrahim; M/s Badruzzaman & Kamal

Reported by Usha Thiagarajah

JUDGMENT

Noor Azian Shaari J:

[1] In this suit, the plaintiff ("P"), Wong Kwi Fong is suing the defendant ("D"), Tenaga Nasional Berhad for the following:

(a) satu deklarasi bahawa Defendan adalah tidak berhak untuk mengeluarkan satu notis bahawa bekalan elektrik di premis Plaintif iaitu di Lot 2728A, Kampung Baru Sungai Buloh, 47000 Sungai Buloh, Selangor Darul Ehsan akan dipotong dalam masa empat belas hari (14) kecuali Plaintif membayar jumlah sebanyak RM717,393.78 sebagai kehilangan pendapatan Defendan akibat pengusikan meter di Premis Plaintiff dan disekat daripada menuntut jumlah sebanyak RM717,393.78 sebagai kerugian pendapatan Defendan tanpa rujukan kepada mahkamah.

(b) perintah injunksi interlokutori menahan dan menghalang Defendan sama ada melalui dirinya sendiri, pengarahnya, kakitangan, agennya atau sesiapapun sahaja menamatkan atau memutuskan bekalan elektrik ke premis Plaintif di Lot 2728A, kampong Baru Sungai Buloh, 47000 Sungai Buloh, Selangor Darul Ehsan pada atau selepas 13 haribulan April 2005 sehingga pendengaran tindakan dalam writ telah didengar oleh mahkamah yang mulia ini atau sehingga satu perintah lanjutan dibuat oleh mahkamah yang mulia ini atau sehingga satu perintah lanjutan dibuat oleh mahkamah yang mulia ini.

(c) Ganti rugi;

(d) Kos tindakan ini; dan

(e) Apa-apa perintah atau relief yang difikirkan adil dan suaimanfaat oleh Mahkamah mulia ini.

[2] The P's claim is that:

(1) The P let out the premise known as Lot 2728A, Kampung Baru Sungai Buloh, 47000 Sungai Buloh, Selangor Darul Ehsan ("P's premise") owned by him to a company called Tropiniaga Sdn Bhd;

(2) The D, on 15 February 2005 at 5.30pm did a routine inspection of the meter at the P's premise and alleged that the meter was found to have been tampered. The meter was taken by the D and a new meter was put in place;

(3) The D issued a letter dated 30 March 2005 with a Borang A (Subperaturan 6A(1)) ("notice") stating that the P had committed an offence under s. 37(3) Electricity Supply Act 1990 ("Act 447");

(4) In the notice the D also notified the P that electricity supply to the P's premise would be terminated on 13 April 2005 unless the P paid the D the sum of RM717,393.78; and

(5) The P then filed this suit on 7 April 2005 and on 9 August 2006 obtained an injunction to stop the D from terminating the supply of electricity to the P's premise.

[3] The D's defence is that the P had tampered with the meter and counter-claimed for the sum of RM717,393.78.

[4] The issue before the court is whether the meter was tampered and if it was, was it by the P.

[5] As stated earlier, the P had obtained an injunction. Therefore the burden shifted to the D to prove on the balance of probabilities that the meter was tampered resulting in the inaccurate reading of the meter, hence the counter-claim for the amount of RM717,393.78.

[6] For the trial the P called two (2) witnesses:

(1) PW1 – Wong Kwi Fong, the P himself and owner of the premise; and

(2) PW2 – Chiew Siew Lin.

[7] The D called four (4) witnesses:

(1) DW1 – Sham Basari bin Mohamed;

(2) DW2 – Azizud-din bin Ali;

(3) DW3 – Ahmad Fuad bin Md. Kasim;

and

(4) DW4 – Ir Ismail bin Lam Din.

[8] At the end of the trial I made a finding that the meter at the premise was indeed tampered. I therefore dismissed prayers (a) and (c) of the statement of claim. Prayer (b) had no relevance as an interlocutory injunction was granted.

[9] In respect of the D's counter-claim, I allowed it with cost but limited the claim for loss of revenue to three (3) months ie, RM47,313.08 instead of RM717,393.78.

[10] The D now appeals against the said decision. It is apparent that the appeal by the D is in respect the amount awarded in relation to the counter-claim as I had found for the D in respect of the tampering. Therefore the reasons given below is in respect of the award of the reduced amount for the counter-claim.

[11] A lesser amount was awarded in respect of the counter-claim is by reason of reg. 11 Licensee Supply Regulations 1990 ("Regulations"). Hence, in this grounds of judgment I would have to justify why a lesser sum was awarded and this involves the interpretation of the relevant provisions of Act 447 and the regulations (specifically reg. 11).

[12] The D argued that as a result of the tampering of the meter which is an offence under s. 37(3) Act 447 the D had suffered a loss of revenue of RM717,393.78. The D therefore has a right to invoke s. 38(3), (4) & (5) of Act 447 to require the P to pay for the loss of revenue. The provisions state that:

38. Disconnection of supply of energy

(1) ...

(2) ... Not applicable

(2A) ...

(3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under section 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying -

(a) the amount of loss of revenue of the expenses incurred by the licensee; and

(b) the person liable for the payment thereof,

shall be *prima facie* evidence of the payment that has to be made by the consumer under subsection (3).

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

[13] Based on the above provisions, the D contends that since the tampering was discovered on 15 February 2005, the D is claiming its losses from 21 August 2000 until 16 January 2005. It is without a doubt, the D is indeed entitled to claim for the losses in revenue by virtue of s. 38(3) Act 447. However, the P referred to s. 11 of the Regulations which is reproduced below:

11. Metering of supplies

(1) The licensee shall provide and fix such meters as it considers necessary for the measurement of the supply of energy to a consumer. Where additional meters are installed by the licensee at the request of the consumer the charge as determined by the licensee shall be paid by the consumer.

(2) The reading of the consumer's meter shall be *prima facie* evidence of the amount of electricity consumed, provided that in the event a consumer has been undercharged or overcharged as a result of:

(a) meter inaccuracy;

(b) malfunctioning of the meter or its associated installation or part thereof;

(c) incorrect meter reading;

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(d) incorrect application of a meter multiplying constant;

(e) cross-connection of installation to different accounts; or

(f) faulty installation,

B the licensee shall make retrospective adjustments to the consumer's account in respect of consumption and demand for such period by taking into consideration the licensee's records, the consumer's consumption record and history, available technical evidence and other relevant circumstances to rectify such undercharged or overcharged situation:

C

Provided that the period for any retrospective adjustment shall not exceed three months from the date the consumer has been informed about being undercharged or overcharged. (emphasis added)

D **[14]** Relying on the proviso of reg. 11(2) of the Regulations, the P submits that for any retrospective adjustment, it must not exceed three (3) months from the date the consumer had been informed about being undercharged or overcharged. The P states that due to the tampering, it results in either "meter inaccuracy" or "incorrect meter reading" envisaged by reg. 11(2) (a) and/or (b) E of the Regulations. As such the proviso applies. Therefore the P cannot be held to be liable/responsible for more than three (3) months of consumption of electricity.

[15] The D on the other hand argued that:

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The **first proviso** to regulation 11(2) "... provided that in the event a consumer has been undercharged or overcharged as a result of:

(a) Meter inaccuracy; ...

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is to cater for situation where the quantity of the electricity cannot be ascertained by the meter and the reading of the meter cannot form a *prima facie* evidence of the amount of electricity consumed due to the fault of the Defendant.

H In other words, the D argued that the proviso is meant only for meter inaccuracy and/or incorrect meter reading due to the fault of the D, maybe, situations such as the meter is faulty or not working.

I **[16]** I do not agree with the D's submission. The proviso is very clear, if there is inaccuracy in the reading of the meter, the proviso applies. Once a meter is tampered, there is inaccuracy and/or incorrect meter reading. The proviso is very clear and must be

given its ordinary interpretation. If accuracy arises out of tampering and it was intended to be excluded, such words as "meter inaccuracy (other than inaccuracy arising out of tampering)" or "incorrect meter reading (other than inaccuracy arising out of tampering)" would/must be included in reg. 11(2)(a) and/or (c) or the words "Notwithstanding the proviso to reg. 11 of the Regulations" could have been/would have been added to s. 38(1) of the Act.

[17] Further, the D referred to the case of *Tan Yeong Kim v. Tenaga Nasional Bhd* [2000] 8 CLJ 629 and stated that "Nowhere in the judgment shows that his Lordship has addressed his mind to the application of reg. 11 to the case of tampering." It must be emphasized here that the case referred to was filed in 1998 (Originating Summons No. 24-1127-98) and the incident that led to the case (routine inspection) took place on 17 March 1998. Regulation 11 of the Regulations as it is now, came into force on 15 December 2002. The previous reg. 11 was amended by reg. 6 Licensee Supply (Amendment) Regulations 2002 (P.U. (A) 489 which came into force on 15 December 2002. Therefore when the case of *Tan Yeong Kim v. Tenaga Nasional Berhad (supra)* was decided it was during the regime of the previous/superseded reg. 11 of the Regulations where the proviso was not in existence.

[18] It would appear to me that the amendment (specifically the proviso) was added so as not to burden consumers of the essential service when the fault is that of the supplier. However, in the process, the situation where meter inaccuracy or incorrect meter reading arose out of tampering was not excluded, most probably, could be due to an oversight.

[19] It must also be noted that nowhere in Act 447 or the Regulations is found an exception to the proviso to reg. 11 of the Regulations in respect of collection of losses of revenue in cases of tampered meter.

[20] For the above reasons I allowed the counter-claim to the extent of three months only ie, from the date the P was being informed of the tampering.